

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**WESTERN FUELS ASSOCIATION, INC.
and BASIN ELECTRIC POWER
COOPERATIVE, INC.**

Complainants,

v.

BNSF RAILWAY COMPANY

Defendant.

Docket No. 42088

**BNSF'S OPPOSITION TO WFA/BASIN'S MOTION TO STRIKE
BNSF'S APRIL 15, 2009 FILING**

BNSF Railway Company ("BNSF") hereby replies in opposition to the April 21, 2009 Motion of Complainants Western Fuels Association, Inc. and Basin Electric Power Cooperative, Inc. ("WFA/Basin") to Strike BNSF's April 15, 2009 Filing, or, in the Alternative, Motion for Leave to File a Surreply to BNSF's Filing ("WFA/Basin Motion to Strike"). The pleading that WFA/Basin seek to strike was entitled BNSF's Opposition to WFA/Basin's Request for Additional Rate Relief ("BNSF's April 15, 2009 Opposition").

WFA/Basin ask the Board to strike BNSF's April 15, 2009 Opposition on grounds that it is a "reply to a reply" that is not permitted under 49 C.F.R. §1104.13(c). *See* WFA/Basin Motion to Strike at 2. BNSF's April 15, 2009 Opposition was a response to an April 2, 2009 pleading by WFA/Basin styled "WFA/Basin's Reply to BNSF's Notice of Filing of Verified Notice of Compliance" ("WFA/Basin's April 2, 2009 Pleading"). Therefore, in a literal sense, BNSF's April 15, 2009 Opposition was a "reply" to WFA/Basin's April 2, 2009 Pleading that was styled a "reply." But while WFA/Basin's April 2, 2009 Pleading was styled a "reply," in substance it

was a request for relief from the Board in the form of an order requiring BNSF to reduce the rates that BNSF set in response to the Board's February 18, 2009 decision in this case ("February 18, 2009 Decision"). A party seeking relief from the Board cannot expect to foreclose a response simply by using the word "reply" in the caption of its pleading and then claiming, disingenuously, that the opposing party's response is an impermissible "reply to a reply." Basic due process requires that a party from whom relief is sought be given an opportunity to respond to the substance of a request for relief.

The label that WFA/Basin seek to place on BNSF's April 15, 2009 Opposition should not be dispositive. WFA/Basin's April 2, 2009 Pleading raised important issues that must be addressed based on a complete record. As BNSF pointed out in its April 15, 2009 Opposition, the approach that WFA/Basin would apply to implement the prescribed revenue-to-variable cost ratios in this case would expand reparations for the period 2004-2008 from about \$112 million to over \$145 million. WFA/Basin cannot reasonably expect that the Board would make a decision on issues with such enormous potential consequences without considering BNSF's substantive position on the underlying issues.

Moreover, as WFA/Basin themselves acknowledge in their Motion to Strike, the Board has frequently permitted a "reply to a reply" to be included in the record in the interests of having a complete record. WFA/Basin Motion to Strike at 5, note 6 (*citing Arizona Electric Power Cooperative, Inc. v. Burlington Northern and Santa Fe Ry. Co. and Union Pacific R.R. Co.*, STB Docket No. 42058, slip op. at 4, note 8 (Served Dec. 31, 2001)). *See also Otter Tail Power Company v. The Burlington Northern and Santa Fe Railway Company*, STB Docket No. 42071, slip op. at 10, note 17 (served November 15, 2002); *Northern States Power Company Minnesota D/B/A Xcel Energy v. Union Pacific Railroad Company*, STB Docket No. 42059, slip

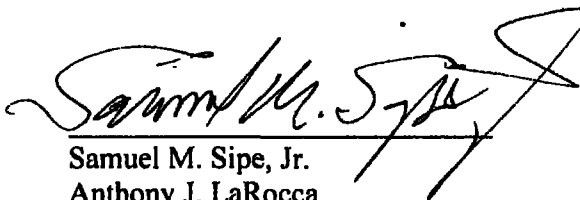
op. at 2, note 3 (served May 24, 2002); *Arizona Public Service Company & PacifiCorp v. The Burlington Northern and Santa Fe Railway Company*, slip op. at 4, note 7 (served October 14, 2003). Even if BNSF's April 2, 2009 Opposition were considered a "reply to a reply," the Board should accept it in interest of a complete record on the issues raised by WFA/Basin.

The Board should give no weight to WFA/Basin's claim that they were "sandbagged" by BNSF's not including WFA/Basin in the setting of the rate. The Board ordered BNSF to establish new rates for the traffic at issue by March 20, 2009, and BNSF complied with the order. When WFA/Basin requested workpapers showing how BNSF derived the new rates, BNSF provided complete workpapers. WFA/Basin had complete information from BNSF on how BNSF set the rates. The Board contemplated that WFA/Basin would bring to the Board's attention any disputes relating to the calculation of variable costs for the issue traffic, February 18, 2009 Decision, slip op. at 31, and WFA/Basin clearly had sufficient information from BNSF to do so, as evidenced by their April 2, 2009 Pleading.

As to WFA/Basin's request for leave to file a surreply to BNSF's April 2, 2009 Opposition, the proffered surreply is little more than a restatement of the positions and arguments that WFA/Basin presented in their original April 2, 2009 request for relief. The surreply does not add anything new. It is nothing more than an attempt by WFA/Basin to have the last word on the issues raised in their April 2, 2009 Pleading.

Respectfully submitted,

Richard E. Weicher
Jill K. Mulligan
BNSF RAILWAY COMPANY
2500 Lou Menk Drive
Fort Worth, TX 76131
(817) 352-2353

A handwritten signature in black ink, appearing to read "Samuel M. Sipe, Jr.", written over a horizontal line.

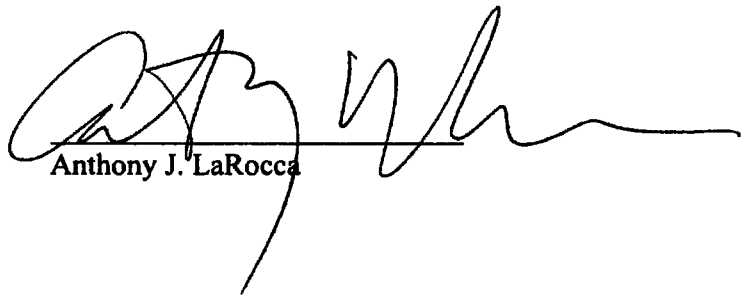
Samuel M. Sipe, Jr.
Anthony J. LaRocca
Frederick J. Horne
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000
ATTORNEYS FOR DEFENDANT

April 28, 2009

CERTIFICATE OF SERVICE

I, Anthony J. LaRocca, hereby certify that on April 28, 2009, I caused a true and correct copy of BNSF's Opposition to WFA/Basin's Request for Additional Rate Relief to be served by hand on the following:

John H. LeSeur
Slover & Loftus
1224 Seventeenth Street, N.W.
Washington, D.C. 20036



Anthony J. LaRocca